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In the Supreme Court of the United States

OCTOBER TERM, 1983

MARTHA MILLS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The Criminal Justice Act, 18 U.S.C. 3006A(d)(1), provides that an appointed attorney "shall * * * be compensated at a rate not exceeding \$30 per hour for time expended in court or before a United States magistrate and \$20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." Petitioner contends that the court of appeals erred in holding that (1) there must exist a minimum hourly fee schedule established by a bar association in order for the Judicial Council to have authority to modify the statutory payment rates, and (2) no such fee schedule existed in this case.

1. On December 18, 1981, the Judicial Council for the Seventh Circuit, acting on the recommendation of the Bar Association of the Seventh Federal Circuit, voted to increase the maximum fees payable to attorneys appointed under the Criminal Justice Act in the Seventh Circuit from \$30 to \$55 per hour for time spent in court or before a magistrate, and from \$20 to \$45 per hour for out-of-court time. The increased hourly rates were to apply to legal work performed after January 1, 1982 (Pet. App. 1 at 2). At the time the Judicial Council voted to increase the hourly fees, there was no bar association minimum fee scale in effect in any of the federal judicial districts within the Seventh Circuit, and none has been established subsequently (*ibid.*).

Petitioner, an attorney in private practice, was appointed under the Criminal Justice Act to represent a defendant in a criminal case in the United States District Court for the Northern District of Illinois (Pet. App. 1 at 3). At the conclusion of her representation, petitioner submitted a bill to the United States magistrate for \$127.50, which was computed on the basis of the new hourly rates adopted by the Judicial Council (*ibid.*). The magistrate approved petitioner's fee request, and the bill was submitted to the Administrative Office of the United States Courts (*ibid.*)

The Administrative Office rejected petitioner's request for full payment. As it explained (Pet. App. 1 at 3):

It is the position of this office that we do not have the authority to reimburse attorneys for services provided defendants proceeding under the Criminal Justice Act in excess of those maximum hourly rates prescribed by the Act. We are bound by the statutory maximum of \$30 per hour for in-court service and \$20 per hour for out-of-court service as specified in 18 U.S.C. 3006A(d)(1).

The Administrative Office sent petitioner a check for \$65 as reimbursement in accordance with the statutory rates prescribed in the Criminal Justice Act (Pet. 13).

2. Petitioner filed this action to obtain an order requiring the government to pay the full amount of her fee request. On cross-motions for summary judgment, the district court granted judgment for the government and dismissed the complaint (Pet. App. 2 at 1-25). Based on its consideration of the language and history of the Criminal Justice Act and the construction of the Act by the Administrative Office (Pet. App. 2 at 9-22), the court held that the Judicial Council lacks authority to alter the statutory rates in the absence of a bar association minimum fee schedule and that the recommendation of the Bar Association of the Seventh Federal Circuit in this case did not satisfy that requirement.

The court of appeals affirmed (Pet. App. 1 at 1-25; 713 F.2d 1249). It undertook an independent examination of the text and background of the Act, and concluded that "a judicial council has authority to raise or lower the minimum hourly rates only if a local bar association minimum fee schedule exists" (Pet. App. 1 at 9). The court pointed out that under a contrary construction "judicial councils would be left with virtually unrestrained authority to increase or decrease the maximum hourly rates, without guidelines or standards" (*ibid.*). The court also ruled that the Seventh Circuit Bar Association's recommendation on the issue of Criminal Justice Act compensation did not constitute a minimum hourly fee schedule established by the bar (*id.* at 11 n.4, 14 n.6).

3. In lengthy and fully considered opinions upon which we rely, the court of appeals and the district court correctly rejected petitioner's construction of the Criminal Justice Act. Moreover, as petitioner acknowledges (Pet. 48), no

other judicial council has sought to alter the statutory rates of compensation and no other court has considered the issue of interpretation raised here. In these circumstances, further review is not warranted.

On its face, the language of 18 U.S.C. 3006A(d)(1) (see page 1, *supra*) clearly ties the authority of the judicial council to a minimum hourly fee scale established by the bar association. In this way, the Act contemplates the existence of a bar fee schedule as a precondition to the authority of the judicial council. Both courts below, while finding that the text of the Act was not dispositive, concluded that this reading of the statutory language was the "more persuasive" (Pet. App. 1 at 5; Pet. App. 2 at 10).

Moreover, this interpretation is also supported by the legislative history of the Criminal Justice Act. This history, which was thoroughly canvassed by the lower courts (Pet. App. 1 at 5-8; Pet. App. 2 at 11-14), shows that Congress intended the authority of judicial councils to be exercised within the limits set by the bar association's fee schedule. For example, the House Report stated that the Act "authorizes judicial councils to establish alternative maximums not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." H.R. Rep. 1546, 91st Cong., 2d Sess. 10 (1970). Likewise, the floor manager of the bill explained that "[r]ates of compensation and maximum amounts of compensation are to be fixed by the judicial councils within maximums prescribed by Congress * * *. If in a particular case the judicial council feels that the hourly maximums are inadequate, it is nevertheless limited to minimum rate, if any, set by a bar association." 116 Cong. Rec. 34811 (1970) (remarks of Rep. Kastenmeier). Whether and how the judicial councils should apply this "exceptional provision" (*id.* at 34812) was to be determined in light of the minimum fee scales set by

the bar.¹ To be sure, as petitioner argues (Pet. 30-31), Congress was aware in passing the Criminal Justice Act that a few states had no minimum fee schedule. But, as would have been expected if petitioner's interpretation were correct, Congress nowhere created an exception for such states or indicated that those judicial councils would have broader—indeed essentially unlimited—authority to depart from the statutorily prescribed rates.²

The fact that minimum fee schedules no longer exist (see Pet. 17, 34; Pet. App. 1 at 4), in the wake of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), does not affect the meaning of the Criminal Justice Act as adopted in 1970. That subsequent development, of course, has changed the way in which the Act is applied in practice. But as the courts below recognized (Pet. App. 1 at 17-18; Pet. App. 2 at 22), it is Congress rather than the judiciary that possesses the power to adapt the Act to intervening events. See, e.g., *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation*, No. 81-1891 (May 24, 1983), slip op. 11-12; *Adams v. Maryland*, 347 U.S. 179, 182 (1954).³

¹For this reason, the courts below correctly concluded that the recommendation of the Bar Association of the Seventh Federal Circuit to increase CJA rates did not constitute the requisite minimum fee schedule.

²The Administrative Office of the United States Courts, based on its "extensive involvement with the Criminal Justice Act since [the Act's] inception," has concluded "that the Circuit Councils do not currently [in the absence of bar fee schedules] possess the authority to increase the hourly rates of compensation above the statutory maximums" (Pet. App. 6 at 2).

³As the district court pointed out (Pet. App. 2 at 22-23), Congress in fact has already considered legislation to amend the Criminal Justice Act. In addition, a bill is currently pending in Congress that would authorize modification of the maximum hourly rates under the Act without regard to bar association fee schedules. See H.R. 4307, 98th Cong., 1st Sess. § 2(a)(3)(A) (1983).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1983